Transferring Employees on an Outsourcing in Brazil: Overview

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A Q&A guide to outsourcing in Brazil.

This Q&A guide gives a high-level overview of the rules relating to transferring employees on an outsourcing, including structuring employee arrangements (including any notice, information and consultation obligations) and calculating redundancy pay.

Transfer by Operation of Law

1. What is an outsourcing?

According to Federal Law No. 13,429/2017 (Labour Law), an outsourcing is the provision of specific services determined by a legal entity, through its own or subcontracted team, to a third party. The service provider must have a corporate purpose that is compatible with the services being rendered (for example, a company offering building or cleaning services must have these defined in its scope within its articles of association), in addition to having capital stock that is compatible with the number of employees.

An outsourcing requires the hired company (the service provider) to perform the services with its own organisation, technical and legal autonomy. The outsourcing of any kind of activities/business is possible (including both core and ancillary activities), provided that both:

- The necessary legal requirements are met.
- The scope of the services is specifically determined.

It should be noted that, in Brazil, the law expressly provides that, in an outsourcing relationship, the service provider has a duty to contract, remunerate and manage the third party's services. Therefore, management of the outsourced professional is the specific obligation of the service provider. In other words, in an outsourcing, there can be no direct subordination between the third party and the customer (as an outsourced professional cannot be a direct employee of the customer).

2. In what circumstances (if any) are employees transferred by operation of law?

Initial Outsourcing of Service Provision

In an outsourcing context, the employees connected to the outsourced business do not transfer automatically from the customer (the transferor) to the supplier (the transferee).

This rule applies in any event where no provision has been made in relation to the employees and the employees will not transfer by law (see below). However, if the parties want them to be transferred with the outsourced business, the customer must terminate their employment agreement, following the proper procedure, and provide severance payment. The supplier will then be able to hire them. However, there is a risk that a direct employment relationship will be deemed to exist between the transferor and these employees if the following elements of an employment relationship are present:

- Personal nature of the services.
- Subordination.
- Compensation.
- Continuity.

Employees are considered transferred by law in the following few circumstances:

- **Group company transfer.** Employees automatically transfer as part of a business transfer between two members of the same group of companies.
- **Employer transfer.** Employees automatically transfer in the context of an acquisition, or transfer of the business (all assets and employees transfer and the same activities and core business are to be maintained). If the transferee replaces the transferor as the employer because it has assumed ownership of the transferor's business, it employs the transferor's employees automatically without having to re-hire them.

In these two cases, the transferee is the transferor's legal successor, and is responsible for any employment-related liabilities and obligations.

In an outsourcing context, there is a risk that a direct employment relationship will be formed between the transferor and the transferee's employees, unless the outsourcing relates to:

- Temporary employment agreements (Labour Law).
- Security, cleaning and maintenance services.
- Specific and determinate services, according to the Labour Law, provided that there is no personal relationship and there is no legal subordination between the transferor and the transferee's employee.

(TST Precedent No 331; Labour Law.)

Change of Supplier or Service Provider

On a change of supplier, the employees connected to the outsourced business do not transfer automatically from the old supplier to the new supplier. There is no legal provision allowing for the employees to be transferred in this way and a change of supplier does not authorise the leasing of the workforce.

Therefore, to this extent, personal services under an outsourcing relationship create a labour risk. As a result, the old supplier must terminate their employment for the new supplier to be able to hire them, and in this case, there is a significant risk that the employee will claim, or the labour authorities will infer, a direct employment relationship with the transferor. However, this does not occur on a group company transfer or an employer transfer (see above, *Initial Outsourcing of Service Provision*).

Service Provision Returning In-house

Employees generally cannot be transferred by law. Therefore, on termination, the employees connected to the outsourced business do not transfer automatically from the transferee back to the transferor or to the customer. The transferee must terminate their employment agreement for the transferor to be able to re-hire them (except where a group company transfer or an employer transfer occurs (see above, *Initial Outsourcing of Service Provision*). However, this practice should be avoided, because of the risk of an employment relationship being recognised (see above, *Initial Outsourcing of Service Provision*).

3. If employees transfer by operation of law, what are the terms on which they do so?

General Terms

An outsourcing does not necessarily involve the transfer of employees (see *Question 2, Initial Outsourcing of Service Provision*). If the transferor terminates the employees' contracts and the transferee hires them, in principle the transferee does not take on any of the transferor's employment-related liabilities. This applies to all types of employees without exception.

However, an employment relationship may be construed to exist between the transferor and the transferred employees even after the termination date (see *Question 2, Initial Outsourcing of Service Provision*). As a result, to avoid any employee claims, the transferor should ensure that both:

- The transferee keeps all of the employment contracts in place on their existing terms.
- The elements of a direct employment relationship do not exist concerning the transferor's relationship with the transferee's employees.

In this regard, it is not recommended for the outsourcing agreement to contain contractual clauses ensuring that the outsourcing customer could retain the employees from the supplier. This contractual provision may be construed as evidence that the customer has powers to interfere with the employees of the supplier, creating a risk of recognition of an employment relationship existing between the workers and the customer.

In cases where employees are transferred by law (see *Question 2, Initial Outsourcing of Service Provision*), for example, if the transferee acquires the transferor's business (all assets and employees), the transferred employee is entitled to all of the economic benefits offered by the transferor (as the former employer), including salaries, pensions and benefits.

If the transferee (as the new employer) offers better salaries, pensions and/or benefits to its own pre-existing employees of the same category and level, transferred employees are also entitled to salaries, benefits and pensions that match those offered by the transferee, provided that:

- Both groups of employees (the transferee's and the transferred employees) have the same job description.
- Both groups of employees have the same technical proficiency or expertise.
- Both groups of employees are equally productive.
- The period for which the employees have been in the same position does not differ by more than two years.

Where the employees transfer by law, the transferee takes on all employment-related responsibilities and liabilities, including liability for unpaid or accrued labour and social security obligations (see *Question 2, Initial Outsourcing of Service Provision*).

In such cases, to avoid any employee claims, it is advisable for the transferee in relation to the transferred employees:

- Not to modify their employment contracts for the worse.
- To extend the benefits it offers to its employees to the transferred employees.
- To confirm that all past labour and social security obligations have been paid by the transferor.

Length of Service

In cases where employees are transferred by law (see *Question 2, Initial Outsourcing of Service Provision*), for example, if the transferee acquires the transferor's business (all assets and employees), the employees retain their period of continuous work. This is relevant to:

- Holiday rights. The period worked before the transfer is included for the purposes of holiday rights.
- Additional days on advance notice. For every year worked for the same employer, the employee is entitled to three extra days of advance notice, limited to 90 days.
- The calculation of the Brazilian Government Severance Indemnity Fund Law (*Contribuição ao Fundo de Garantia por Tempo de Serviço*) (FGTS).

Where there are changes to the service provider (second or third generation outsourcings), as a matter of good practice, it is recommended to avoid having the same outsourced professionals remaining for long periods through successive service contracts, even if the service provider company changes and there is a process of termination and re-hiring of the professional. The continuity and individuality of the provision of services, under these conditions, weakens the outsourcing of services and may bring it closer to an employment relationship. It is important to bear in mind that the outsourcing is connected to the receipt of the services and is not a mechanism to lease employees. This is why the outsourcing customer should avoid retaining the same outsourced professionals for long periods.

Employee Benefits

Where employees transfer by law, the transferred employees have the right to keep the employee benefits that were granted by the transferor. In addition, if the transferee offers additional or more favourable benefits to its own employees of the same category and level, the transferred employees are entitled to receive these better benefits.

However, in the cases where the old supplier terminates the employment agreement so that the new supplier can hire the same professionals, it is recommended that the new supplier observes the same salaries and benefits, to reduce the risk of any financial liabilities. This option does not, however, prevent the risk of the outsourcing arrangement being considered fraudulent and the deemed recognition of an employment relationship existing directly with the outsourcing customer.

Pensions

Social security pensions are paid by the Social Security Administration (the employer makes social security contributions towards such pensions). As a result, the transfer of employees should not have any effect on employees' pensions.

Where employees transfer by law and were previously part of a private pension scheme, if the transferee does not offer a similar scheme to transferred employees, the employees may be able to make a claim to ensure that their benefits are maintained. If the private pension scheme offered by the transferee to its own employees of the same category and level is better than the private pension scheme the transferor offered to an employee, the transferred employee is entitled to benefit from the better scheme.

Other Matters

Collective bargaining agreements (CBAs) are entered into for a limited time only (usually for one year). In cases where employees transfer by law from the transferor to the transferee, the transferred employees are entitled to all employee benefits granted under the CBA in force during their employment with the transferor until the expiry of the bargaining agreement. Upon expiry of this agreement, a new collective bargaining will be required to address the normative benefits and potential changes in union representation. This is because, in accordance with the understanding of the Superior Labour Court, the rules set out in collective agreements are an integral part of each individual employment contract for all purposes, even after the expiration of such agreement, except if a subsequent collective agreement on such benefits becomes effective (Precedent TST No. 277).

If the CBA applicable to the transferee's employees at the time of the transfer offers additional or more favourable benefits to the transferee's employees of the same category and level as a transferred employee, the latter is entitled to these additional benefits.

> 4. If the employees do not transfer by operation of law but there is a commercial agreement in place for them to be transferred, what employment rights, obligations, and terms must the parties to the agreement adhere to or are common practice to honour? Is the position only governed by the commercial agreement between the parties?

As we mentioned in *Question 3*, this practice is best avoided, because any contractual arrangement in this regard could be construed as evidence that the customer has powers to interfere with the employees of the supplier, creating the risk of recognition of an employment relationship existing between the workers and the outsourcing customer. Therefore, it is not a common practice to include such a provision in an outsourcing agreement, and in cases where there is a master agreement that is applied to many jurisdictions, it is recommended to have a provision to guarantee that the local law and practice should prevail.

Harmonisation

5. Is a transferee required to harmonise the terms and conditions of transferring employees with those of its existing workforce? If so, what does it mean to harmonise terms in your jurisdiction? What are the risks for the transferee of not harmonising terms, or failing to do so correctly?

The automatic transference of employees is feasible in a few situations (see *Question 2*). In this context, provided the benefits received by the transferred employees under their former employment are maintained (see *Question 2*), the transferee can harmonise the transferring employees' terms and conditions with those of its existing workforce (and must extend all benefits granted to its employees to transferring employees).

Any harmonisation should seek to comply with two main labour and employment principles:

- To guarantee equal treatment between the employees to avoid any discriminatory practices.
- To not implement any change that would be detrimental to employees.

If the harmonisation does not comply with these principles, there is a risk that the employees could claim for moral and material compensation due to unequal treatment. Any detrimental changes implemented would be considered null and void and as a consequence the employees would be entitled to seek the return of the previous conditions and/or the compensation for the harmful changes.

6. If there is no legal requirement to harmonise terms and conditions of transferring employees with those of its existing workforce, what are the risks and challenges for the transferee of harmonising, or choosing not to harmonise, the terms and conditions of transferring employees with those of its existing workforce?

Where there is no requirement to harmonise (that is, when an automatic transfer is not applicable), the risk for not harmonising would still be that employees could claim for moral and material compensation due to unequal treatment. Any detrimental changes implemented would be considered null and void and as a consequence, the employees would be entitled to seek the return of the previous conditions and/or the compensation for the harmful changes.

Dismissals

7. To what extent can dismissals be implemented before or after the outsourcing?

The concept of redundancy does not exist in Brazil, and dismissals would therefore be treated as terminations without cause.

Generally speaking, dismissals can be made at any time by the employer, except where protection against dismissal applies, for example, in the case of pregnant employees, employees on sick or accident leave, as well as other legal or collective labour agreement provisions on job security. Provided the dismissals are not in breach of these protected categories, they can be implemented freely either before (by the transferor) or after (by the transferee) the transfer.

Where terminations are necessary due to discontinuance or reduction to outsourcing services or due to a change of services provider (termination without cause), the terminations must observe the standard procedures provided by law. In these situations, the dismissed employees are entitled to receive the complete severance package (for details of severance payments, see *Question 10*). Conversely, terminations for cause (that is, terminations with a justifiable reason, such as due to behaviour or performance) are very restrictive and are limited only to the cases specified in Article 482 of the Labor Code. With a termination for cause, employees are entitled to certain labour rights, but these are much more limited than the severance package provided in the case of termination without cause.

Given that, in Brazil, the law expressly provides that, in an outsourcing relationship, the service provider has a duty to contract, remunerate and manage the third party's services (and must not be subject to interference by the customer), it is recommended that the service provider avoids terminating the employment agreement with the employees to allow them to be re-hired by a new supplier. This is because this may create evidence of personal service in the provision of services and focuses overly on the hiring on the specific professionals and not on the general provision of the services.

8.What liability could arise for the transferor or the transferee for any dismissals before the transfer?

Generally speaking, there are no risks for the transferor or transferee in relation to dismissals made in the context of a change of service provider where there is no automatic transfer of employees.

There is also no risk of liability in cases where the automatic transfer of employees is legally possible, provided the transferee intends to take over the employment agreements and no terminations would be required. However, the transferor is free to dismiss employee(s) at any time up to the transfer date and the transferee is free to dismiss the employee(s) at any time after the transfer date (see *Question 7*).

9. What liability could arise for the transferor or the transferee for any dismissals after the transfer?

In the case that the transferring employees are terminated and re-hired by a different supplier for the customer to then use, the risk is the consideration of fraud in outsourcing, since the new supplier will use a workforce that remains as an employee of the old supplier. In this scenario, both the old and new suppliers may be declared jointly and severally liable and, in the case of inspection by competent bodies, may both be subject to administrative infraction notices and fines.

In the few cases in which automatic transfer is legally possible, dismissals made after the transfer can only be done by the transferee. This is because, as a legal consequence of the automatic transfer, the transferee becomes the legal employer and assumes responsibility for the employment agreements.

Redundancy Pay

10. How is redundancy pay calculated?

With regards to the termination of employment agreements, Brazilian law sets out specific procedures that must be followed upon termination. Under Brazilian law, terminations can be made:

- For cause (justifiable reason).
- Without cause (without justifiable reason).
- Following resignation.
- By mutual agreement.

Given that the concept of redundancy does not exist in Brazil, dismissals would be treated as terminations without cause.

Based to the type of termination (with or without case/resignation/mutual agreement), the severance package will be calculated (using a payroll calculator) according to the relevant legal requirements.

On termination, the employer is required to pay the requisite amounts with ten days.

Termination can also be ratified using a specific Employment Contract Termination Form (*Termo de Rescisao de Contrato de Trabalho*). Ratification is not mandatory, but certain unions and CBAs may require ratification.

There was a recent change in labour legislation to confirm that collective dismissal does not require collective bargaining. However, whether this provision is constitutional is currently being questioned before the Federal Supreme Court (STF - Extraordinary Appeal No. 999,435, with recognised general repercussion - Topic 638)

Termination for Cause

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Termination Without Cause

Employers terminating employees without cause must pay severance to those employees. Severance comprises the FGTS that the employer has put aside monthly for employees. The employer must also pay an additional 40% of the FGTS balance to employee as compensation for the dismissal.

Employees terminated without cause may also be entitled to unemployment funds. The government allowance varies depending on the employee's salary and their years of service.

To be entitled to the benefit, an employee must meet the following criteria:

- They have been employed for six months during the past 36 months.
- They have received at least the minimum wage for the last six months.
- They have not received any other income from employment or investments.
- They have not received any government benefits (with the exception of a pension due to the death of a partner or work injury).

If the employer terminates a fixed-term employment contract without cause, the employer will be required to pay 40% of the FGTS balance to employee as compensation for the dismissal.

Termination by Mutual Agreement

See above, *Termination Without Cause*. If the employer and employee agree to the termination, the 40% FGTS penalty is reduced to 20%.

Resignation

Provided employees adhere to the 30-day notice period, they can resign at any time without cause. Employees who resign will not be entitled to the FGTS, will not benefit from the 40% from the employer, nor will they be entitled to employment funds.

Secondment

> 11. In what circumstances (if any) can the parties structure the employee arrangements of an outsourcing as a secondment? What are the risks of doing so?

The parties can structure the employee arrangements of an outsourcing as a secondment; in this case there is still likely to be a direct employment relationship between the seconded employee and the customer (see *Question 1*).

Under Brazilian law, the "reality principle" applies when determining whether an employment relationship exists. This means that, if the elements of an employment relationship exist when a person provides services, an employment relationship will be found to exist. The elements that characterise an employment relationship are:

- Personal nature of the services.
- Subordination.
- Compensation.
- Continuity.

A supplier's employee will have direct employment relationship with an outsourcing customer if the employee can prove that these elements exist in their relationship with that customer.

If the outsourcing customer replaces the supplier in an outsourcing, but requests that the new supplier hires certain employees of the former supplier, it is most likely that a direct employment relationship will be inferred between the customer and those employees. In this regard, the customer risks the outsourcing being declared fraudulent, the recognition of an employment relationship existing directly with them, as well as being subject to inspection by the competent authorities, with the likely imposition of a fine.

Information, Notice and Consultation Obligations

12. What information must the transferor or the transferee provide to the other party in relation to any employees? Are there any time limitations or requirements?

On a transfer of employees, the transferee should require information from the transferor regarding:

- Payment of salaries, benefits and social security obligations.
- Compliance with labour obligations.
- All documents that prove the history of employment.

On a formal transfer of employees, the transferee is liable for labour and social security obligations accrued before the transfer. As a result, the transferee should carry out a due diligence process and confirm that the transferor has complied with its obligations to the employees before entering into any outsourcing agreement that transfers employees and their labour and social security rights (see *Question 1* and *Question 3*).

13. Are there any restrictions or limitations on the personal data of employees that can be shared between the transferor and the transferee?

To conduct an outsourcing, it is necessary for the transferor to transfer the employees' personal data to the transferee. For the transfer to comply with the law, it must be carried out within the scope of the Brazilian General Data Protection Law (*Lei Geral de Proteção de Dados Pessoais*) (Law No. 13,709/18) (LGPD) and the Guidance for Definitions of Personal Data Processing Agents established by the Brazilian Data Protection Authority (*Autoridade Nacional de Proteção de Dados*) (ANPD).

To comply with the law, certain measures will need to be carried out prior to the transfer date.

The parties should establish a data processing agreement (DPA) to highlight the parties' obligations and responsibilities regarding the data processing, or at least include these obligations in the main outsourcing agreement, since in Brazil the requirement to formalise a separate DPA is not a legal obligation. The DPA or the clauses in the main agreement should cover aspects such as (among others):

- The period for storing the data.
- The security measures to be adopted.
- Details for communication between the parties in the event of a data breach or incident involving the transferred data.
- The obligation to enter into a data processing agreement or similar instrument with any data sub-processors.
- Details for storage location.

The parties should ensure that any transfer of data complies with the principles of necessity/minimisation under Article 6 III of the LGPD. This means that:

- Only relevant, proportionate and not excessive data should be transferred between the parties.
- The parties should only process the minimum amount of personal data possible within the reality of the outsourcing operation.

The parties must also adhere to the principle of transparency under Article 6 VI and Article 6 I of the LGPD. Therefore, the employment contract entered into with the transferred employees should include:

- Provisions stipulating that the employees' personal data will be processed and transferred to the transferee on the transfer date.
- Provisions setting out the purpose of their data being processed as well as providing information on the channels that can be used for them exercise their rights as data subjects.

14. What are the notice, information and consultation obligations that arise for the transferor or the transferee in relation to employees, employee representatives, trade unions, works councils, or local authorities?

On a formal transfer of employees (see *Question 1*), the new employer must update:

- The employee's work card.
- Its employee registry.
- Its labour inspection book, which contains details of all employees.
- Its monthly report on hired and terminated employees (*Cadastro Geral de Empregados e Desempregados* (CAGED)).
- Its annual report on social security information (*Relação Geral de Informações Sociais* (RAIS)).
- The FGTS account by the proper forms (SEFIP/GFIP).
- Its food programme for employees (*Programa de Alimentação do Trabalhador* (PAT)).

If an employee changes their location, this must be noted on their work card. If a direct employment relationship is created between the customer and the supplier's employee, the employer's records must be updated to reflect this.

There is no obligation to consult with a union/works counsel, worker representatives, or other authorities. Moreover, the steps above are only applicable if the employee's transfer is legally allowed (for outsourcing procedures, employees transfers are not possible).

Employee Objection to Transfer

15. What action can an employee take if they object to transferring on an outsourcing and what effect does their objection have?

Where there is a legal transfer, there is usually no objection from the employee as there will be a continuity of service. However, in the case of objection by the employee, the alternative is the termination of the employment agreement by the employer.

In situations where the employee does not transfer as part of a legal transfer, the contract for employment with the transferor would need to be terminated without cause and the transferor would be required to observe the severance payments provided by law.

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